BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket No. 92-264
Protection and Competition	)	
Act of 1992	)	
	)	
Horizontal and Vertical Ownership	)	
Limits, Cross-Ownership	)	
Limitations and Anti-Trafficking	)	
Provisions	)	

To: The Commission

REPLY COMMENTS OF NATIONWIDE COMMUNICATIONS INC.

Nationwide Communications Inc. ("NCI"), by its attorneys, hereby files it reply comments in response to the Notice of Proposed Rule Making, released December 28, 1992, in the above-captioned proceeding (the "Notice").

In its initial comments filed in this proceeding (the "NCI Comments"), NCI focused on that part of section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") which prohibits a cable operator from holding an MMDS license or offering SMATV service "separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system." As the Commission recognized in paragraph 26 of the Notice, the legislative history of the Act indicates that this cross-ownership prohibition is not intended to prevent the common ownership of a SMATV system that

itself qualifies as a "cable system" under section 602(6) of the Communications Act,[1] and a second separate stand-alone SMATV system, and NCI demonstrated that the Commission's cross-ownership rules must include an exemption reflecting Congress' intent on this issue.

The legislative history of the Act also shows that Congress enacted the cross-ownership prohibition in order to promote competition in the multi-channel video marketplace. Unfortunately, certain commenters in this proceeding suggest weakening the cross-ownership prohibition in a manner that will result in negating its intended pro-competitive impact. The Commission should not accept these suggestions.

Underlying the section 11 of the Act is Congress' intent to protect consumers from unreasonable rates, and to promote competition in the provision of multi-channel video services.[2]

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[1] Many SMATV systems which are clearly not traditional cable systems, and which compete against traditional cable systems, fall under the statutory definition of "cable system" because part of the system crosses a public right-of-way.

[2] See Sections 2(a)(1), 2(a)(2) and 2(b) of the Act; See also House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 26 (1992) (hereinafter, the "House Report"):

> H.R. 4850 is designed to address the principal concerns about the performance of the cable industry and the development of the market for video programming since passage of the [1984] Cable Act. This legislation will protect consumers by preventing unreasonable rates ... and by sparking the development of a competitive marketplace.

Congress recognized that the accomplishment of the second goal (the emergence of true competition in this market) would itself advance the first goal (the protection of consumers).[3] The cross-ownership prohibition is necessary to promote a level field on which emerging but vulnerable players such as independent SMATV operators can compete with traditional cable operators. The prohibition is an important means for accomplishing this goal because it prevents traditional cable operators from blocking or buying out competition from independent SMATV operators. Yet, if the suggestions of certain commenters, largely traditional cable operators, are accepted, the prohibition would be so emasculated that it would be useless in preventing this anti-competitive behavior.[4]

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[3] See House Report at 30:

> The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to regulation. The Committee also recognizes, however, that until true competition develops, some tough yet fair and flexible regulatory measures are needed.

[4] While the comments discussed below are largely those filed by cable MSOs, some of the recommendations made in the joint comments of the National Private Cable Association, Maxtel Associates Limited Partnership, MSE Cable Systems and Pacific Cable Vision ("NPCA") are similar to those made by the MSOs. Because the prohibition is obviously intended to protect SMATV operators from the anti-competitive behavior of cable operators, the sympathy for the positions of cable operators in comments filed by SMATV operators might be, at first glance, rather mystifying. The motive is made clear, however, on pages 11-13 of their Comments: NPCA is seeking to reduce regulatory barriers that could limit the ability

For example, Time Warner Entertainment Company, L.P. ("Time-Warner") makes the following argument: 1) the language of the Cable Act prohibits cable operators from providing "SMATV service," not from owning or providing separate service from SMATV "facilities"; 2) furthermore, in light of the unclear distinction between "cable" and "SMATV" facilities, it is the unregulated nature of "SMATV service" that distinguishes it from "cable service," and thus; 3) if a cable operator provides service from a facility that is "technically" a SMATV, it should not be subject to the prohibition if it provides that service pursuant to all of the requirements of its franchise. Comments of Time-Warner at pages 58-61. See also Comments of NPCA at pages 12-13. This interpretation would, in practice, eliminate the prohibition: cable operators would be allowed to provide multichannel video service, separate and apart from their franchised cable service, using a facility that is in fact, and not just "technically," a SMATV. This is precisely the situation that the cross-ownership prohibition was designed to prevent. Furthermore, Time-Warner's suggestion ignores the fact

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of SMATV operators to sell their systems to cable operators. The theory offered by NPCA to justify its position is that by providing "reasonable exit strategies" for potential investors in SMATV, more people will invest in SMATVs, thus creating more viable competitors in the multi-channel market. This argument is obviously flawed. It is hard to assert, with a straight face, that promoting the ability of cable operators to buy out their competitors is an effective approach to increasing competition in the multi-channel video market. Congress did not enact the cross-ownership prohibition to encourage SMATV operators to "exit" that market; but rather, to encourage them to "enter" and "stay."

that the cross-ownership prohibition was designed to promote competition between cable operators and SMATV operators, not to promote the provision by cable operators of anti-competitive services that incidently comply with franchise requirements.

Similarly, the operators note that the Act only prohibits the provision of SMATV service by cable operators separate and apart from the provision of franchised cable service. Thus, they assert that if SMATV service is provided in conformity with all of the requirements of its franchise, such service is not "separate and apart" from franchised service, and therefore, is not prohibited. Time Warner Comments at page 63, Comments of NCTA at page 59. In addition to misreading the language of the Act, this argument is flawed for the reasons stated in the above paragraph.

The operators also assert that their provision of SMATV service would not be "separate and apart" if the SMATV system is eventually interconnected with the cable system. Time-Warner at page 64, NCTA at page 59. Such a suggestion is based on an overly narrow view of the definition of SMATV service that is subject to the cross-ownership prohibition. As Time-Warner notes, there is no statutory definition of "SMATV service." Comments of Time-Warner at page 59. However, in distinguishing SMATV and cable service for the purposes of the cross-ownership prohibition, reliance solely on physical interconnection or the crossing of public rights-of-way,[5]

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[5] See Section 602(6) of the Communications Act of 1934, the so-called "SMATV exception."

allows cable operators to easily avoid the prohibition, and thus negates a major tool which Congress intended be used to inject competition into the multi-channel market. Rather, for the purposes of the prohibition, the essential nature of "SMATV service," as opposed to "cable service," is the provision of multi-channel video programming to multiple dwelling units pursuant to a contract with the owner of such buildings under which the SMATV operator is the exclusive provider of multi-channel programming to the dwelling -- "cable operators" do not have such exclusive contracts. Thus, cable operators should be prohibited from using interconnection to multiple dwelling units outside of their actual service area to provide exclusive multi-channel video service.[6]

Some commenters attempt to limit the effect of the cross-

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[6] While NCI does not support the proposal that interconnection can create an exception to the application of the prohibition, if the Commission accepts that proposal, it must ensure that this exception from the rules is not abused in an anti-competitive manner. First, the rules should require interconnection within 30 days, not 6 months, as suggested by Time-Warner (at page 67) and Cablevision Industries Corporation/Comcast Corporation ("Cablevision") (Comments at page 30). A 30 day period is technically feasible, and any longer interconnection period, especially in light of the likelihood of numerous requests for extension of time, will invite the abusive tactics that the prohibition is intended to prevent. Second, even an interconnected SMATV facility should be considered to be offering service "separate and apart" from cable service if the operator offers bulk rates to subscribers substantially lower than those offered to its ordinary residential subscribers. The promotion of competition through the uniform geographic rate structure requirements set out in section 3 of the Act "dovetails" with the cross-ownership prohibition. While the cross-ownership prohibition is an attempt to prevent established cable operators from blocking or buying out competitors, the uniform geographic rate requirement is an attempt to prevent established cable operators from destroying competitors with predatory rate practices.

ownership prohibition by asserting that if an operator provides SMATV service inside its cable franchise area, but outside of its actual service area, it is not subject to the prohibition. Comments of Time-Warner at page 67, Comments of the National Cable Television Association ("NCTA") at page 60, Comments of NPCA at pages 8-9. Time-Warner (at page 68) justifies this argument by asserting that it allows operators to efficiently serve multiple dwelling units in areas of low population density that are not generally cost-efficient to wire. However, the Act's grant of waiver authority, where necessary to ensure the provision of programming to all portions of the franchise area, undercuts any need for a broad exemption from the prohibition. Furthermore, it is precisely this sort of "leap-frogging" that the prohibition was intended to prevent.

Lastly, Time-Warner asserts (Comments at page 57) that because cable operators are generally subject to vigorous competition in the provision of service to multiple dwelling units ("MDUs"), there should be a blanket waiver of the prohibition where 15% of the MDUs in an operator's area receive service from SMATVs. As a multi-channel video provider that competes directly with Time-Warner in the Houston, Texas market, NCI has direct knowledge that the premise of Time-Warner's argument (vigorous competition exists in the MDU market) is dubious. Furthermore, there is nothing in the Act or its legislative history to suggest that Congress intended that some level of SMATV penetration into MDUs should trigger a

blanket waiver of the prohibition. Accordingly, the proposed waiver must be rejected.

Conclusion

Congress enacted the cross-ownership prohibition based on a substantial record of abusive actions by cable operators designed to block out or buy out potential competitors. An effective cross-ownership rule will promote lower prices and higher quality service to consumers. The Commission must not enact a "watered down" version of the prohibition envisioned by Congress.

Respectfully submitted,

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March 3, 1993

CERTIFICATE OF SERVICE

I, Inder M. Kashyap, an employee of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the foregoing "Reply Comments of Nationwide Communications Inc." was sent this 3rd day of March, 1993, first class United States mail, postage prepaid, to the following:

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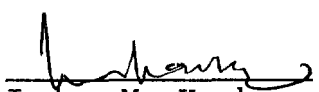

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